BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BUNTHAROS PORTERFIELD	)	
Claimant	)	
	)	
VS.	)	
	)	
USD 490	)	
Respondent	)	Docket No. 1,055,075
	)	
AND	)	
	)	
EMPLOYERS MUTUAL CASUALTY CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appeal the June 1, 2011, preliminary hearing Order of Administrative Law Judge (ALJ) Thomas Klein. Claimant was awarded preliminary benefits after the ALJ determined that claimant's travel and a lunch break away from her normal working environment were inherent in her employment. The ALJ found claimant suffered an injury by accident that arose out of and in the course of her employment.

Claimant appeared by her attorney, R. Todd King of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Kirby A. Vernon of Wichita, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of the Preliminary Hearing held April 28, 2011, with attachments; and the documents filed of record in this matter.

ISSUES

1. Did claimant's accident and resulting injuries arise out of and in the course of her employment with respondent? Respondent contends claimant was on her lunch break when she suffered her injury and, therefore, her injury did not arise out of and in the course of her employment. Claimant contends that travel was an integral part of her job and that respondent accepted the fact claimant would have to stop and

eat lunch while traveling. Claimant asserts that although she was not paid for her lunch break, the injury she suffered during her lunch break arose out of and in the course of her employment.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant is a para-educator employed by USD 490. She is based, however, in Derby, Kansas. Claimant works with visually impaired students in both Derby and Butler County, Kansas. Although she does not travel every day, generally on certain days (including Fridays), claimant travels to schools to work with the students. On the days claimant works in Derby, she eats lunch at her workplace or she goes out for lunch. When she travels outside of Derby, she takes a lunch break when she desires or as her schedule permits. Respondent allows claimant to take lunch as it fits within her travel schedule.

On February 11, 2011, (a Friday) claimant was traveling to Andover, Kansas, when she stopped for lunch at the Malaysian Café. After claimant had eaten lunch, she exited the café and fell while walking to her automobile. She had not yet arrived at her automobile when she fell. Claimant is not paid for the time she is on her lunch break.

Claimant's supervisor, Lorna Holmes, confirmed claimant is not paid during her lunch break. Ms. Holmes indicated claimant was paid for travel time between schools, just not during her lunch break. Ms. Holmes acknowledged travel is an inherent aspect of claimant's job. Respondent argues claimant was on her discretionary lunch break and was injured before she re-engaged her work activity of traveling to another school. Claimant asserts the lunch break was an inherent part of claimant's employment.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[1]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[2]

---

[1] K.S.A. 2010 Supp. 44-501 and K.S.A. 2010 Supp. 44-508(g).

[2] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[3]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[4]

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer.[5]

> The "going and coming" rule is based upon the premise that, while on the way to or from work, the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Therefore, such risks are not causally related to the employment.[6]

There is an exception to the "going and coming" rule when travel upon the public roadways is an integral or necessary part of the employment.[7]

---

[3] K.S.A. 2010 Supp. 44-501(a).

[4] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[5] K.S.A. 2010 Supp. 44-508(f).

[6] *Sumner v. Meier's Ready Mix, Inc.*, 282 Kan. 283, 289, 144 P.3d 668 (2006).

[7] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

> In the case of a major deviation from the business purpose, most courts will bar compensation recovery on the theory that the deviation is so substantial that the employee must be deemed to have abandoned any business purpose and consequently cannot recover for injuries received, even though he or she has ceased the deviation and is returning to the business route or purpose.[8]

Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to that particular case.[9]

A situation similar to this case is discussed in *Messenger*.[10] In *Messenger*, the claimant was killed while traveling home from a distant drill site. The Kansas Court of Appeals noted in *Messenger* that:

> Kansas has long recognized one very basic exception to the "going and coming" rule. That exception applies when the operation of a motor vehicle on the public roadways is an integral part of the employment or is inherent in the nature of the employment or is necessary to the employment, so that in his travels the employee was furthering the interests of his employer.[11]

The Board determined a matter very similar to this incident in *Anthony*.[12] In *Anthony*, the claimant was a delivery driver who was injured while going into a restaurant for lunch. The Board held that travel was an integral part of Anthony's job and, as such, while away from his employer's premises, Anthony was usually considered to be within the course of his employment continuously during the trip. The Board Member who determined *Anthony* noted the exception to the "going and coming" rule as discussed in *Messenger*, regarding travel being an integral part of the employment.

The facts in *Jung*[13] are also similar to the current claim. In *Jung*, the claimant worked as a service manager installing and servicing business telephone systems. Jung spent 90% of his time away from respondent's central business location. After working at a job site, Jung and a co-worker went to lunch at a convenience store. While returning to

---

[8] *Id.*, at 284.

[9] *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984).

[10] *Id.*

[11] *Id.*, at 437.

[12] *Anthony v. United Parcel Service, Inc.*, No. 1,037,950, 2008 WL 2354935 (Kan. WCAB May 6, 2008).

[13] *Jung v. Progressive Communication Products*, No. 1,040,452, 2008 WL 4763724 (Kan. WCAB Sept. 30, 2008).

work, their truck was struck by another vehicle and Jung was injured. The Board Member who determined *Jung* also noted the "going and coming" rule exception set out in *Messenger* and found that Jung's travel was an integral part of his job.

Here, claimant's job required her to be working away from respondent's Derby location as a regular part of her job. Thus, travel is clearly an integral part of her job and the "going and coming" rule would not apply to deprive claimant of workers compensation benefits in this situation. Claimant's travel and taking a flexible lunch break while traveling clearly benefitted respondent. The determination by the ALJ that claimant is entitled to workers compensation benefits as the result of this accident is affirmed.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[14] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[15]

CONCLUSIONS

Claimant's job required that she travel regularly and that travel was an integral part of that job. Thus, the restrictions of the "going and coming" rule do not apply to this accident. Claimant has satisfied her burden that she suffered an accidental injury which arose out of and in the course of her employment with respondent. The Order of the ALJ which granted claimant preliminary benefits should be affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Thomas Klein dated June 1, 2011, should be, and is hereby, affirmed.

IT IS SO ORDERED.

---

[14] K.S.A. 44-534a.

[15] K.S.A. 2010 Supp. 44-555c(k).

Dated this ____ day of August, 2011.

THOMAS D. ARNHOLD
BOARD MEMBER

c: R. Todd King, Attorney for Claimant
Kirby A. Vernon, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge